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No. 89-1817

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF RIVERSIDE and COIS BYRD,
SHERIFF OF RIVERSIDE COUNTY,

Petitioners,

vs.

DONALD LEE McLAUGHLIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the motion for preliminary injunction should have been denied since the California statutory provisions provide defendants with timely probable cause determinations required by the Constitution as set forth in *Gerstein v. Pugh*.

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THE MOTION FOR PRELIMINARY INJUNCTION SHOULD HAVE BEEN DENIED AS THE CALIFORNIA STATUTORY PROVISIONS PROVIDE DEFENDANTS WITH TIMELY PROBABLE CAUSE DETERMINATIONS REQUIRED BY THE CONSTITUTION AS SET FORTH IN *GERSTEIN V. PUGH*. 3

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The opinion of the Court of Appeals for the Ninth Circuit is reported at 888 F.2d 1276. The memorandum order of the United States District Court for the Central District of California granting a preliminary injunction in the case has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1989. A petition for rehearing was denied by the Ninth Circuit on April 10, 1990. The petition for a writ of certiorari was granted on October 1, 1990. The jurisdiction of this court rests upon 28 U.S.C. section 1254(1).

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of all the District Attorney's Offices throughout the state for the purpose of presenting their views in cases which may have major statewide impact upon the prosecution of criminal offenses.

The interest of Amicus Curiae arises from the sensitive and important Fourth Amendment issues of persons incarcerated by warrantless arrest, balanced against the

government's important right in administratively processing an inmate pursuant to the statutory requirements of the California Penal Code.

CONSENT OF PARTIES

Counsel has requested consent of all parties. Counsel of record for both the Petitioner and Respondent have consented to the filing of this Amicus Curiae Brief in Support of Petitioners. Additionally, pursuant to Rule 37.5, consent to the filing of a brief of an amicus curiae is not necessary when, as here, the brief is presented on behalf of a political subdivision of a State. The present brief is submitted on behalf of the 58 county district attorney offices in California through the California District Attorney's Association.

SUMMARY OF ARGUMENT

The Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103 held that the Fourth Amendment requires a probable cause determination by a magistrate as a condition of any significant pretrial confinement. *Gerstein* did not specify any particular time within which such a hearing must be held and left the implementation of its holding up to the individual states. In response to *Gerstein*, California enacted statutes which mandated that review within two days after an arrest excluding Sundays and holidays.

California's pre-trial proceedings for arraignment and probable cause determination fully comply with the

mandate of the Fourth Amendment as set forth in *Gerstein*. The trial court's order that such hearings be held within 36 hours therefore exceeded the scope of injunctive relief necessary to provide the charged defendants with their constitutional rights as mandated in *Gerstein*.

ARGUMENT

THE MOTION FOR PRELIMINARY INJUNCTION SHOULD HAVE BEEN DENIED AS THE CALIFORNIA STATUTORY PROVISIONS PROVIDE DEFENDANTS WITH TIMELY PROBABLE CAUSE DETERMINATIONS REQUIRED BY THE CONSTITUTION AS SET FORTH IN *GERSTEIN V. PUGH*

In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), this honorable court held the Fourth Amendment required a determination of probable cause by a neutral and detached magistrate "as a condition for any significant pretrial restraint on liberty." 420 U.S. at 125. The court said at pages 113-114, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate."

Gerstein clearly holds the separate states are allowed to develop their own procedures to implement the rules the court set forth within its opinion. It is certainly clear that the Supreme Court never envisioned a state the size of California being subjected to 58 different procedures

for handling probable cause determinations.[1] "[W]e recognize the desirability of flexibility and experimentation *by the States*. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, (Citation), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release." *Gerstein, supra,* 420 U.S. at page 123. (Emphasis added.) This is, as will be set forth below, precisely the procedure adopted in California.

In *Bernard v. City of Palo Alto,* 699 F.2d 1023 (1983), this court held the trial court's determination that the probable cause hearing had to be made within 24 hours of arrest *"was eminently reasonable."* While it may be correct to conclude 24 hours is a reasonable time period under the circumstances of that case, that conclusion does not address the true issue. The question which should have been answered in *Bernard* and must be answered here is whether *Gerstein* mandates a specification of what is a reasonable time for making the probable cause determination in each county within the State? The answer is no.

Varied circumstances in each county as well as varied terrain and distances between the court houses within each county will produce a multifaceted picture as hearings are conducted in each county to determine what is

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[1] California has, as this Court is undoubtedly aware, 58 separate and distinct counties. Each county has its own prosecuting agency as well as many law enforcement agencies within its boundaries. For instance, Orange County has 22 distinct police departments and a separate sheriffs department.

"reasonable" within that county's unique makeup. The end will be multiplicity of rules dependent upon which trial court hears each case and the evidence, unique to each county, developed during the trial. This result has been evidenced already by the cases of *Bernard, supra,* (California; 24 hours); *Williams v. Ward,* 845 F.2d 374 (1988) (New York; 72 hours); *Kanekoa v. City and County of Honolulu,* 879 F.2d 607 (1989 9th Cir.) (Hawaii; no specific time period required and no per se rule adopted); and the instant case in California holding 36 hours is *the* reasonable time limit.

This court said in *Kanekoa, supra* at page 610, "The Supreme Court has not established a specific time period in which a suspect must be afforded a probable cause hearing. (Citation.) We have rejected any per se rules and have held that the time period required by the fourth amendment depends on the circumstances of each case. See *Bernard v. City of Palo Alto,* 699 F.2d 1023, 1025 (9th Cir. 1983.)" This is the position which must be adopted if the guidelines set out in *Gerstein* are properly applied. It is the unique circumstances of each case which determines whether or not the probable cause determination was made "promptly." However, California has set outside limits on what can be said to be "prompt." Penal Code sections 825, 849, 859, 859b, 991 and article I, section 14 of the California Constitution specifically address this issue.

California Penal Code section 825, which was enacted in 1872, provides, in relevant part: "The defendant must in all cases be taken before the magistrate *without unnecessary delay,* and, in any event, within two days after his arrest, excluding Sundays and holidays; . . . . " The

phrase, "and, in any event, within two days after his arrest. . . . ", was added in 1927. In *Youngblood v. Gates*, 200 Cal.App.3d 1302 (1988), the Court of Appeal held that section 825 had to be interpreted in such a way as to avoid expansion of custodial time. It held the two day period is only a limitation on *necessary* delays. The court said at page 1319, "Thus, *no unnecessary delay* is permissible between the time of arrest and presentation to a magistrate, even if that presentation takes place within two days. Accordingly, in *People v. Thompson*, 27 Cal.3d 303, 329 (1980), the court held: 'The critical factor is the necessity for any delay in arraignment. These provisions do not authorize a two-day detention in all cases. Instead, "a limit [is placed] upon what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is in violation of the statute and of the Constitution." ' "

The focus in *Gerstein, Bernard, Kanekoa, Youngblood* and other cases dealing with the subject is whether the time period between the arrest and presentation before a magistrate was a reasonable time under the circumstances *of that case*. The statutes set an outside limit within which there is a presumption of reasonableness or appropriateness.

In *People v. Williams*, 68 Cal.App.3d 36 (1977), the Court of Appeal observed, '[t]here is no authority to delay for the purpose of investigating the case. Subject to obvious health considerations the only permissible delay between the time of arrest and bringing the accused before a magistrate is the time necessary: to complete the arrest; to book the accused; to transport the accused to court; for the district attorney to evaluate the evidence

for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading. (Citations.)" *Williams, supra*, at page 43. That statement or holding is without question in line with the letter and spirit of *Gerstein*.

California Penal Code section 849, which was added to the statutory framework in 1984 provides in relevant part: "(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, shall, *without unnecessary delay*, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate." Section 849 was before this court in *Bernard, supra*. There was no contention the *statute* was unconstitutional. There, as here, the issue was focused upon the particular *County's* policy for handling in-custody defendants. This court held that "[t]he time fixed [24 hours] was not meant to define the constitutional right. . . . The order served the important practical function of identifying the outer time limit in the vast majority of cases." *Bernard* at page 1025.

Section 849 had already set the outer time limit. The procedure in *Bernard* and in the instant case of holding evidentiary hearings in each county to determine the "outer time limits" based upon the county's geography, size, number of law enforcement agencies, etc. is not within the concept envisioned by *Gerstein*. As noted earlier, such a procedure will require no less than 58 hearings, one in each of California's counties, to determine the specific circumstances particular to that governmental

entity. *Gerstein* never envisioned such a process. It left the issue for each *state* to determine, not each separate governmental body within the state. If a county develops and implements a policy as did Santa Clara and Riverside, that policy would be subject to evaluation by a court to determine whether it is in conflict with California statutory provisions and *Gerstein*.

The process utilized by the trial court of conducting evidentiary hearings in each county is burdensome, impractical and the result obtained in the instant case of a specific time restriction raises significant equal protection questions. Those arrestees unfortunate enough to be taken into custody in a jurisdiction which can justify a 72 hour delay (the situation in *Williams v. Ward, supra*) will certainly seek to invalidate their detention on equal protection grounds resulting in additional court proceedings. However, none of this is necessary if the statutory procedures adopted in California, are constitutional under the mandates of *Gerstein*.

California Penal Code section 991 which was enacted in 1980 provides in relevant part, "(a) If the defendant is in custody at the time he appears before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof." This section mandates an immediate probable cause determination in all cases of defendants in custody at the time of arraignment, if the defendant or his counsel so requests. Interestingly enough, this is exactly what the highest court in

this nation stated over twenty years ago was sufficient to satisfy the Fourth Amendment! Notwithstanding this clear compliance with the Supreme Court's unambiguous statement in *Gerstein*, the trial court concluded probable cause hearing must occur within 36 hours of arrest.

Calif. Constitution art. I, section 14 mandates all persons accused by felony complaint be taken *without unnecessary delay* before a magistrate. No *unnecessary* delay is permissible, even within the 2 days allowed by statute. The critical factor is the reason for the delay. A delay can be unreasonable under the circumstances even if less than 2 days. *Youngblood v. Gates, supra*. Additionally, as recognized in *Williams v. Ward, supra*, many of the arrestees dispose of their cases at arraignment although they may have sat in jail for two days awaiting transportation to the magistrate. To require a probable cause hearing prior to arraignment in such cases is certainly nonproductive and a waste of the local government's tax dollars, which is of course an additional burden on the already overburdened taxpaying public.

One of the most significant facts considered in *Gerstein*, which is not present in California, is that there was no right to a preliminary hearing if the Florida prosecutor filed an information. This is a very significant distinction in felony cases. As this court is no doubt aware, in California, a preliminary hearing serves as a probable cause hearing in felony cases. In Florida, the filing of the information foreclosed the suspect's right to a preliminary hearing. Nor could the suspect utilize habeas corpus to test the probable cause for detention under the information. There was a special statute which allowed a preliminary hearing after 30 days and arraignment which

of course would mean the suspect had been detained for a month or more before any determination of probable cause was made by a detached magistrate.

This was the foundation upon which the Supreme Court built its decision in *Gerstein*. These are not the facts in California. The petitioners in *Gerstein* sought an order giving them the right to a probable cause determination. That was a right they did not enjoy in Florida. The District Court ordered the County to give the defendants (plaintiffs in the action) an immediate preliminary hearing to determine probable cause for further detention. Subsequent state action resulted in adoption of a procedural rule in Florida which mandated every arrested person be taken before a judicial officer within 24 hours, however, that officer did *not* make a probable cause determination. The District Court held this practice was unconstitutional, a ruling we have yet to experience in California. The issue in *Gerstein* was stated by the Supreme Court to be "whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention. . . . " California provides the "judicial determination of probable cause for detention" in *all* cases.

Section 859, enacted in 1872, mandates that those charged with felonies "shall, *without unnecessary delay*, be taken before a magistrate. . . . " Section 859b, enacted in 1963 sets out the time restrictions for having preliminary hearings on felony charges. The preliminary examination would be scheduled at the time defendant appears for arraignment, which would be within the two days prescribed by section 825 as discussed above and within the time frame envisioned by the court in *Gerstein*.

As can be seen from even this cursory examination of the statutory provisions in force prior to *Gerstein*, and those enacted in response to *Gerstein*, defendants in California are afforded significantly greater rights than those Floridian defendants the Supreme Court was concerned with in *Gerstein*.

Although no court, state or federal, has to date held California Penal Code sections 825, 849, 859, 859b, 991 or article I section 14 of the California Constitution to be in violation of the fourth and fourteenth amendments to the Constitution as interpreted in *Gerstein, supra*, the ruling by the district court in the instant case was tantamount to such a determination. A determination of how much time is "reasonable" to carry out the phases of the process from arrest to arraignment is a legal conclusion. It appears, however, that respondents in the instant case sought, and, at least inferentially, obtained a determination that the Riverside procedures, and presumably the California statutes, were unconstitutional within the meaning of *Gerstein*.[2]

It is one thing to conclude that the procedures adopted by a particular County in California fail to comply with the mandates of *Gerstein*, it is quite another to say the statutory provisions are unconstitutional. The trial court here considered only the local procedures adopted by Riverside. While the record may support a conclusion by the trial court that the Riverside procedures did not provide a "prompt" probable cause

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[2] It appears that a district court of three judges would be required to enjoin enforcement of a state-wide rule. See *Gerstein v. Pugh, supra*, 420 U.S. at page 109 footnote 10.

determination the trial court was not at liberty to write legislation to provide special local procedures aimed at compliance with *Gerstein* and then command its adherence by local authorities via a preliminary injunction. This is a function reserved for the legislature, not a trial court.

The trial court clearly abused its discretion by ordering probable cause determinations within a specific number of hours. It could find, if the evidence supported the conclusion, that Riverside's procedure violated the mandates of the California Constitution and the various statutory provisions which provide an incarcerated defendant with certain rights encompassed within the Fourth Amendment. It could then order Riverside to comport its procedures with those mandated by the State which provide all the protection required by *Gerstein*.

What is "prompt" will be determined by the particular circumstances of each case. Under the California statutory scheme, as interpreted by various appellate courts, and presumably approved by the Supreme Court in *Gerstein*, the outside limit for holding a probable cause hearing is 48 hours, not the 24 hours as ruled in *Bernard* nor the 36 hours ordered by the trial court here. Indeed, as noted above, even 24 hours may be found to be "unnecessary" under particular circumstances. So too 36 hours could exceed the time necessary for the appropriate administrative steps and therefore not be "prompt" within the meaning of *Gerstein*.

This honorable court knew exactly what it was doing in *Gerstein* when it did not specify a time period within which a probable cause determination must be made. It

recognized that the vast multitude of variables present in the various states due to geography, population, jail facilities, law enforcement manpower, etc. belied a specific minimum or maximum time period for conducting the probable cause hearing. That foresight should not be so eagerly disregarded by stipulations between county officials and defendants who file an action in federal court, or by federal judges who are requested to give injunctive relief to persons asserting fourth amendment violations.

California's pre-trial proceedings for arraignment and determination of probable cause incorporated into the constitution and various statutes, fully complies with the mandate of the Fourth Amendment as set forth by the Supreme Court in *Gerstein*. Compliance with that statutory scheme by petitioner Riverside County provided the respondents with all the constitutional protection expounded upon in *Gerstein*.

CONCLUSION

The trial court's order exceeded the scope of injunctive relief necessary to provide the charged defendants with their constitutional rights as mandated in *Gerstein*.

For the foregoing reasons it is clear the motion for preliminary injunction should have been denied.

DATED this 9th day of November, 1990

Respectfully submitted,

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